In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1149

WILLIAM NELSON QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that an exhibit not admitted into evidence was improperly submitted to the jury and that it was error for the trial court to permit the government to submit a sentencing memorandum to it.

Following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted of carrying a pistol without a license, in violation of 22 D.C. Code 3204 (1973 ed.).[1] He was sentenced to nine months' imprisonment and fined $1,000. The court of appeals affirmed (Pet. App.).

The evidence at trial showed that petitioner was arrested on January 19, 1974, by a District of Columbia Metropolitan Police Officer who, in the course of executing a search warrant at an after-hours club at 1016

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[1]At the close of the government's case the court granted petitioner's motion for judgment of acquittal on a charge of maintaining a gambling establishment (April 11 Tr. 154-155).

Sixth Street, N.E., witnessed petitioner in possession of a .38 caliber revolver, which petitioner was not licensed to carry and which was registered to another person (April 11 Tr. 5; Pet. App. 1a).

1. Several photographs of the premises of the after-hours club were admitted into evidence at trial. One, however, showing the rear entrance of the building with the door open and a trash can inside, was not admitted, yet the deputy court clerk mistakenly included it among the exhibits he sent to the jury during their deliberations (Pet. App. 2a).

Petitioner's right to be present at every stage of his trial, whether derived from the Sixth Amendment (*Diaz* v. *United States*, 223 U.S. 442, 445) or simply from D.C. Superior Court Crim. Rule 43,[2] was not violated by the erroneous submission of this photograph to the jury. The transmission of exhibits to the jury is a mere ministerial act performed by the court clerk, *Dallago* v. *United States*, 427 F.2d 546 (C.A.D.C.), and does not amount to a communication between the trial judge and the jury of which the defendant must necessarily and contemporaneously be apprised.[3] In short, the routine transmission of exhibits to the jury is not a "stage of the trial" (*Diaz* v.

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[2]That provision is in all respects material to this case identical to Rule 43(a), Fed. R. Crim. P. Both provide that "[t]he defendant shall be present * * * at every stage of the trial * * *."

[3]The lack of communication between judge and jury in this case distinguishes it from *Rogers* v. *United States*, 422 U.S. 35, on which petitioner relies (Pet. 6). In *Rogers*, a case involving a prosecution under 18 U.S.C. 871(a), the jury after deliberating for two hours inquired of the district court whether it would accept a verdict of guilty with a recommendation of mercy and, upon the court's affirmative response, returned such a verdict within five minutes. The Court held that in those circumstances the district court's failure to apprise

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United States, supra, 223 U.S. at 444; D.C. Superior Court Crim. Rule 43) for purposes of petitioner's right to be present throughout all the proceedings against him.

Nor can petitioner demonstrate any prejudice from the jury's consideration of unadmitted evidence, for, as the court below noted (Pet. App. 4a-5a), the unadmitted photographs (of the rear entrance of the building inside which petitioner was arrested) related to issues involving one of petitioner's co-defendants and was wholly irrelevant to petitioner's case.[4]

2. Petitioner also contends (Pet. 7-9) that 23 D.C. Code 103 (1973 ed.) provides that the government may participate in the sentencing process only if the defendant chooses to exercise his right of allocution.[5] The court of appeals'

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the defendant of the exchange amounted to plain error under Fed. R. Crim. P. 43. The instant case, in contrast, involved no such substantive exchange between the court and the jury.

[4]Petitioner's statement (Pet. 4) that Officer Dixon testified that he saw petitioner put a jacket containing a gun in a trash can at the rear entrance is simply incorrect. Officer Dixon was testifying about petitioner's co-defendant (April 11 Tr. 6-7). We are lodging a copy of the transcript of Officer Dixon's testimony (which occurred on April 11, 1974, and not, as petitioner states (Pet. 4), on April 10, 1974) with the Clerk of this Court.

[5]That Section provides:

> Before imposing sentence the court may disclose to the defendant's counsel and to the prosecuting attorney, but not to one and not the other, all or part of any pre-sentencing report submitted to the court in the case. The court also prior to imposing sentence shall afford counsel an opportunity to speak on behalf of the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. At any time when the defendant or his counsel addresses the court on the sentence to be imposed, the prosecuting attorney shall, if he wishes, have an equivalent opportunity to address the court and to make a recommendation to the court on the sentence to be imposed

rejection of this contention affects criminal litigation in the District of Columbia only and presents no issue of nationwide importance warranting this Court's consideration. Moreover, the decision is correct. As the court pointed out (Pet. App. 7a-9a), the legislative history of Section 103 demonstrates (1) that Congress expected the government to play a role in the sentencing process and (2) that the statutory language from which petitioner derives superficial support for his position was intended to assure the prosecutor's presence at any time the defendant addressed the court with respect to the sentence to be imposed. Thus, even assuming that the submission of the sentence report two days prior to sentencing[6] amounted to "allocution" by the government (Pet. 4), Section 103 was not violated.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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and to present information in support of his recommendation. Such information as the defendant or his counsel or the prosecuting attorney may present shall at all times be subject to the applicable rules of mutual discovery.

[6]Defense counsel was served with a copy of the government's memorandum at the same time it was submitted to the trial court (Pet. App. 5a).

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